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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-773

STATE OF OREGON, Petitioner

vs.

MICHAEL JAMES ELSTAD, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Michael James Elstad, now residing in Silverton, Oregon, asks leave to file the attached brief in opposition to the Petition for Writ of Certiorari filed by the State of Oregon on November 7, 1983, to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on February 16, 1983, without prepayment of costs and to proceed in forma pauperis. The respondent's affidavit in support of this brief in opposition is attached hereto.

GARY D. BABCOCK
Public Defender for Oregon
STEPHEN J. WILLIAMS
Deputy Public Defender for Oregon
Counsel for Respondent

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OCTOBER TERM, 1983

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STATE OF OREGON, Petitioner

v.

MICHAEL JAMES ELSTAD, Respondent

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Michael James Elstad, being first duly sworn according to law, depose and say, in support of my application for leave to proceed without being required to repay the costs or fees:

1. I am respondent in the above entitled case.

2. Because of my poverty I am unable to pay the costs of said cause, and still provide myself with the necessities of life.

3. I am unable to give security for the same, and still provide myself with the necessities of life.

4. I believe I am entitled to the redress I seek in said cause.

5. I am unable to obtain from the court below a certified copy of the record without payment of fees and costs.

6. I was charged in Polk County, Oregon with burglary in the first degree, ORS 164.225. I was tried and convicted of the charge in a trial before the court. The Polk County Circuit Court imposed a five year sentence and ordered that I pay $18,000 restitution. I appealed this conviction to the Court of Appeals of the State of Oregon, which reversed and remanded for a new trial. 61 Or App 673, 658 P2d 552 (1982). The Supreme Court of the State of Oregon denied the state's petition for review, 295 Or 617, 670 P2d 1033 (1983).

This brief in opposition is filed for the purpose of urging this Court to deny the Petition for Writ of Certiorari sought by the State of Oregon.

Michael Elstad
MICHAEL JAMES ELSTAD, Respondent

Subscribed and sworn to before me this 12th day of January, 1984.

Tracy Louise Knopp
NOTARY PUBLIC FOR OREGON
My Commission Expires: 1-8-88

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-773

STATE OF OREGON, Petitioner

vs.

MICHAEL JAMES ELSTAD, Respondent

On Petition for a Writ of Certiorari to
the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Was defendant's jailhouse confession tainted by an earlier admission he made to arresting officers when he was arrested pursuant to a warrant and interrogated without the benefit of Miranda warnings, where the jailhouse confession was made to the arresting officers not more than one hour after defendant's arrest but after Miranda warnings at the jail?

OPINIONS BELOW
JURISDICTION
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Petitioner's statements of these matters are accepted.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT PRESENT A SIGNIFICANT FEDERAL QUESTION. THE DECISION OF THE OREGON COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISIONS CONCERNING THE ADMISSIBILITY OF CONFESSIONS MADE AFTER INADMISSIBLE CONFESSIONS.

The decision of the Oregon Court of Appeals in this case is consistent with prior decisions of this Court. See: United States v. Bayer, 331 US 532, 67 S Ct 1394, 91 L Ed 1654 (1947); Westover v. United States, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966); Clewis v. Texas, 386 US 77, 87 S Ct 1338, 18 L Ed 2d 423 (1967).

In addition, both the Oregon Supreme Court and the Court of Appeals have consistently and correctly applied the federal standard in this area. See: State v. Foster,

288 Or 649, 607 P2d 173 (1980); State v. Mendacino, 288 Or 231, 603 P2d 1376 (1979); State v. Hibdon, 57 Or App 509, 645 P2d 580 (1982); State v. Pelletier, 43 Or App 677, 603 P2d 1247 (1979); State v. Paz, 31 Or App 851, 572 P2d 1036, rev den (1977); State v. Garrison, 16 Or App 588, 519 P2d 1295, rev den (1974).

Defendant was initially interrogated by Deputy Burke after defendant was arrested at his house, but before he was given Miranda warnings. Warnings were required before any interrogation because defendant was in custody.

Defendant's written confession was inadmissible because it was tainted by his prior statement, which he made in response to Deputy Burke's questioning at defendant's house.

Officer Burke asked defendant what he knew about the burglary. Defendant responded, "I was there." (Tr 74-75, 84). Defendant was transported to the Polk County Jail, where he finally received Miranda warnings, 45-60 minutes after his arrest. Defendant was interrogated by the arresting officers at the jail. He signed a constitutional rights waiver card and confessed.

The leading Oregon case on the admissibility of a confession made after an inadmissible confession is State v. Mendacino, 288 Or 231, 603 P2d 1376 (1979), which was relied upon by the Oregon Court of Appeals in this case. In State v. Mendacino, supra, 288 Or at 237, the Oregon Supreme Court stated:

> "The effect of a later confession following an inadmissible confession was described by the United States Supreme Court in United States v. Bayer, 331 US 532, 540-541, 67 S Ct 1394, 91 L Ed 1654 (1947):

> "'Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under any circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.' (Emphasis added.)
>
> "The removal of the improper conditions generally involves a change in time and location sufficient to dissipate the pernicious effects of the unlawful conduct. We believe that the Supreme Court in Clewis v. Texas, 386 US 707, 710, 87 S Ct 1338, 18 L Ed 2d 423 (1967) stated the proper rule that the change, or the 'break in the stream of events,' should be sufficient to 'insulate the statement from the effect of all that went before.' Cf., Evans v. United States, 375 F2d 355 (8th Cir 1967)." (Footnote omitted.)

Defendant's written confession was made, at most, one hour after his initial admission to Officer Burke. The second confession was not sufficiently removed in time from the first admission.

Defendant was moved from his house to the jail. However, he remained in police custody. The same officers interrogated defendant at the jail. The change in location was not sufficient to remove the taint.

The confession was at least partially an expansion of defendant's prior statement admitting he was at the scene of the burglary. Defendant was undoubtedly influenced by the content of his prior admission. There was no break in the stream of events which dissipated the taint of defendant's first admission.

II.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH LOWER FEDERAL COURT DECISIONS

The state asserts that "[t]he rule of federal constitutional law announced by the Oregon Court of Appeals is in direct conflict with that applied in the same circumstances by federal courts" (Pet. p. 8). The state is wrong.

In support of its contention the state cites three cases: Knott v. Howard, 511 F2d 1060 (1st Cir 1975); United States v. Knight, 395 F2d 791 (2d Cir 1968); United States v. Toral, 536 F2d 893 (9th Cir 1976). The state does not discuss the facts of any of these cases and sets out only a brief excerpt from United States v. Toral. Each of these cases is distinguishable from the present case. None of these cases even remotely present the "same circumstances" as the arrest and interrogations of defendant in this case.

In Knott v. Howard, supra, the court held that Miranda v. Arizona was inapplicable. Furthermore, the defendant's second confession was not the product of police interrogation. 511 F2d at 1061.

In United States v. Knight, supra, the defendant was charged with interstate transportation of pornographic materials. State officers questioned the defendant in his home about where he obtained the materials, which the officers had seen while they were with defendant in his house for another reason. The defendant told the police he had obtained the materials in California. The defendant sought to suppress subsequent statements to federal agents after they gave him Miranda warnings. The opinion states:

> "* * * The major element of the crime --possession, which creates the presumption of intent to sell--was established by appellant's voluntary act of showing the films, the photographs in plain sight, and the lawful search of the premises incident to the arrest by city police. It is true that appellant had 'let the cat out of the bag,' see United States v. Bayer, 331 U.S. 532, 540, 67 S.Ct. 1394, 91 L.Ed. 1654 (1947), by telling the local officers that he had brought the pictures from California. However, no psychological disadvantage flowed from that because appellant apparently thought that the fact that he did not obtain the material in New York protected him. Moreover, that the admission was once made should not, in itself, always be fatal, see United States v. Bayer, supra; surely, federal authorities must sometimes be allowed to conduct reasonable investigations even when state authorities have failed properly to apprise suspects of their constitutional rights. * * *" 395 US at 975. (Emphasis added.)

In United States v. Toral, supra, federal agents went to defendant's home with a warrant to search it for drugs. The agents were admitted by the defendant's wife, and several persons were inside, some of whom were suspected of being involved in narcotics trafficking. An agent found a brown paper bag containing heroin in a bedroom. They asked the defendant who the bedroom and bag belonged to. The defendant said they were his. The defendant was arrested and given Miranda warnings. He then admitted he had received some heroin and was holding it because of the money involved. In affirming the defendant's conviction, the court stated:

> "In the present case appellant's initial statements were rendered involuntary almost exclusively because of the failure of the police to give him the Miranda warnings. There was very little that was inherently coercive about the circumstances leading up to the admissions made by appellant either before or after the warnings were given. All of the questioning took place in the security of appellant's own home, see Knight, supra, and the initial questioning, though

> improper, was in the form of preliminary questions that may have been asked of anyone in order to narrow the field of suspects. * * *" 536 F2d at 896.

In the instant case, Officers Burke and McAllister had obtained a warrant for defendant's arrest for the burglary before they went to his home. When Burke interrogated defendant in defendant's living room, Burke was not attempting to narrow the field of suspects. The police had already demonstrated to a magistrate that they had probable cause to arrest defendant for the burglary. Burke's questions were not preliminary. He confronted defendant with an allegation that defendant was involved in the burglary. The questions were calculated to obtain an admission of guilt from defendant.

The decision of the Oregon Court of Appeals is not inconsistent with any of the federal cases the state relies on. The state's argument that law enforcement officers in Oregon are held to two conflicting standards in attempting to comply with the Fifth Amendment is spurious.

CONCLUSION

The decision of the Oregon Court of Appeals was correct. The petition for writ of certiorari should be denied.

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